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No. 08-887

Supreme Court
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Supreme Court of the United States

SAN DIEGO COUNTY, CALIFORNIA, *et al.*,

Petitioners,

—v.—

SAN DIEGO NORML, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents argue below (at Part I, *infra*) that Petitioners' lack of Article III standing to obtain a ruling from this Court regarding whether key provisions of California's medical marijuana law are preempted by federal law, renders this case an inappropriate vehicle for review. Aside from that impediment to certiorari, on the merits the question presented is

> Does the federal Controlled Substances Act preempt the provision of California's Medical Marijuana Program Act that requires counties to issue identification cards to help state law enforcement officers distinguish between conduct that is criminal and conduct that is not criminal under state law?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents hereby make the following disclosures:

1) There are no parent corporations for any of the Respondents; and

2) No public corporation owns 10% or more stock in any of the Respondents.

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STATEMENT OF THE CASE

For years, states have charted their own paths regarding penal drug statutes. Some states have made their laws more severe than federal law, some less severe, and some have completely decriminalized the possession of small amounts of marijuana. Never before this case has it been suggested that the decades-old federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA"), preempts state drug laws because the state has not criminalized a portion of the conduct prohibited by the CSA. This novel and baseless contention is the gravamen of the petition for certiorari in this case.

California is one of thirteen states in which the use of marijuana for medical purposes (and only for those purposes) is not a criminal offense under state law.[1] In 1996, California voters enacted the Compassionate Use Act ("CUA"), which narrowed the reach of state marijuana law by exempting seriously ill Californians and their caregivers from prosecution under state law if they possess or cultivate marijuana for "personal medical purposes" with a physician's recommendation. Cal. Health & Saf. Code § 11362.5(d). The Act's only other command dictates

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[1] The other twelve are Alaska, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. *See* Alaska Stat. § 17.37.010 *et seq.*; Colo. Const. art. 18, sec. 14; Haw. Rev. Stat. § 329-121 *et seq.*; Me. Rev. Stat. Ann. tit. 22, § 2383-B(5); Mich. Comp. Laws § 333.26421 *et seq.*; Mont. Code Ann. §§ 50-46-101 *et seq.*, 50-46-201 *et seq.*; Nev. Rev. Stat. § 453A.010 *et seq.*; N.M. Stat. Ann. § 26-2B-1 *et seq.*; Or. Rev. Stat. § 475.300 *et seq.*; R.I. Gen. Laws § 21-28.6-1 *et seq.*; Vt. Stat. Ann. tit. 18, § 4472 *et seq.*; Wash. Rev. Code § 69.51A.005 *et seq.*

that a physician shall not be punished for recommending marijuana to a patient for medical purposes. Cal. Health & Saf. Code § 11362.5(c).

In 2003, California enacted the Medical Marijuana Program Act, Cal. Health & Saf. Code §§ 11362.7-11362.83 ("MMP"), which fleshed out how the State would implement the CUA. To help California's law enforcement officers distinguish individuals whose possession and use of marijuana is not criminal under state law, from individuals whose possession and use is criminal, the MMP established among its implementation mechanisms a voluntary identification-card program under which medical-marijuana patients and caregivers may apply for a card, subject to verification procedures established by statute, that identifies the bearer as someone who uses or possesses marijuana for medical purposes. *See* Cal. Health & Saf. Code §§ 11362.71, 11362.72. A person in possession of a valid identification card is not subject to arrest under California law except under specified circumstances, Cal. Health & Saf. Code § 11362.71(e), though nothing in the MMP (or any other state law) purports to exempt card-holders from arrest or prosecution under federal law. Indeed, as the California Court of Appeal noted in the decision below, "the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses." App. of Pet'r San Diego County (hereinafter "Pet. App.") 35.

The federal Controlled Substances Act criminalizes the possession, manufacture, and

distribution of marijuana. *See* 21 U.S.C. §§ 841(a), 844(a). But the CSA also allows the states to continue their longstanding practice of enacting widely varying penal drug laws. Specifically, Congress included an express anti-preemption clause in the CSA, under which preemption is limited to the narrow set of circumstances in which there is a "positive conflict" between state and federal law. 21 U.S.C. § 903. Thus Congress accorded the states wide latitude to define the scope of their own penal drug laws and to decide how to enforce them.

Petitioners San Diego County and San Bernardino County ("the Counties"), both political subdivisions of the State of California, filed separate suits claiming that the MMP and certain sections of the CUA are preempted under federal law. Significantly, as the California Court of Appeal noted, Petitioners "did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana provided by [the CUA] is unconstitutional." Pet. App. 3.

The original defendants in the San Diego suit, who are all Respondents before this Court, were the State of California, one of its officers, and a non-governmental advocacy organization promoting the reform of marijuana laws. Pet. App. 50. A group of patients and caregivers intervened as defendants and are also Respondents here. Pet. App. 50-51. Petitioner San Bernardino sued only California and a state official. Pet. App. 50. The two cases were consolidated in the state trial court and remained

consolidated in the appellate court. Pet. App. 10-11, 50.[2]

Construing the CUA and MMP as protecting medical marijuana users only under state, but not federal, law, Pet. App. 56, the state trial court granted Respondents' motions for judgment on the pleadings and held that the CUA and MMP are not preempted by the CSA. Pet. App. 58, 60.

The California Court of Appeal affirmed. Pet. App. 47. The court held first that even under California's liberal standing jurisprudence, the Counties lack standing to challenge all but the identification-card provisions of the MMP because none of the other provisions at issue requires the Counties to do anything or injures them in any way. Pet. App. 20-21. As to the merits of the remaining claims, the court held that the federal CSA does not preempt the identification-card provisions of the MMP because Congress expressly disclaimed an intent to occupy the field of drug regulation, Pet. App. 23, and because the implementation of the identification-card provisions neither conflicts with federal law nor poses an obstacle to the achievement of federal objectives. Pet. App. 28-41. The California Supreme Court denied review. Pet. App. 68.

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[2] The organizations and individuals who submit this brief are Respondents only in the San Diego case, but because of the history of consolidated argument and decision, this brief will address the arguments advanced by both Counties. Both Counties' petitions should be denied for the same reasons.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because this case is a poor vehicle for addressing the issue that the Counties ask the Court to address, because there is no split of authority on the questions decided by the lower court, and because in any event the decision below was correct. This case's weakness as a candidate for certiorari is reflected in the Counties' ambivalence about what is truly at stake in this case. The Counties have been very careful not to challenge the heart of California's medical marijuana laws—the decriminalization provision—presumably because they realize the State has a sovereign right to decide what should and should not be criminal under its own laws. Yet, at the same time, the Counties insist that their challenge to other provisions of California's medical marijuana regime necessarily implicates, and should force a decision about, the very provision the Counties have gone out of their way not to challenge.

As explained in more detail below, the Counties' challenge ultimately fails either way. They cannot invoke this Court's review of the decriminalization provision because they have failed to raise it below. They lack standing to do so anyway because state-law decriminalization does not create an injury in fact to the Counties, so all this Court is left with is a challenge to California's identification-card system. And the Court of Appeal was correct to reject that challenge for the same reasons California's decriminalization provision is constitutional: states have the sovereign right to choose what to make criminal under their own laws and, as a corollary, to

enable their officers to distinguish what is criminal from what is not under state law. For all of these reasons, certiorari should be denied.

I. Review Should Be Denied Because the Counties Lack Standing To Raise The Question Whether California's Decriminalization of Medical Marijuana Is Preempted.

At most, petitioners have standing in this Court to challenge only one ancillary aspect of the MMP—the identification-card program. They do not have standing to raise what they characterize as the "important question" this case presents, Pet. of San Diego County 13, that is, whether federal law preempts California's law decriminalizing the use by qualified patients, under a physician's recommendation, of small amounts of marijuana for medical purposes. *See* Cal. Health & Saf. Code § 11362.5(d). In fact, the Counties explicitly disclaim such a challenge, and always have. Pet. of San Diego County 26 n.7 ("Only one provision of the statute actually exempts individuals from prosecution under California law, and the County does not challenge that provision."); *see also* Pet. App. 3 (decision below) (noting that the Counties "did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana . . . is unconstitutional"). Thus the issue presented for decision is not (as the Counties would now have it) whether California's decision not to criminalize the "use, possess[ion] and cultivat[ion] of marijuana for medical purposes[] is preempted under the Supremacy Clause," Pet. of San Diego County, at

i, but rather the much smaller issue of whether California's identification-card program is preempted. That issue is not worthy of this Court's attention, and so certiorari should be denied for this reason alone.

1. The Court of Appeal appropriately restricted the scope of its decision to the MMP's identification-card program, because the Counties "do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them." Pet. App. 20.

The California courts, like other state courts, may establish their own rules of standing for adjudication in their own courts, but once a case arrives in this Court, Article III standing requirements apply. *See, e.g., Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). Those requirements are at least as strict as the California-law standing requirements applied by the Court of Appeal below. "[I]n order to have Article III standing, a plaintiff must adequately establish . . . an injury in fact," that is, "a 'concrete and particularized' invasion of a 'legally protected interest.'" *Sprint Communications Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The MMP's identification-card provisions aside, in challenging California's medical marijuana laws, the Counties do not seek to vindicate their legally protected interests because those laws do not provide any rights to, or impose any obligations on, California's counties. The Counties do not disagree. Nowhere in their petitions to this Court do the Counties maintain that the CUA

or any aspect of the MMP, other than the identification-card program, requires the Counties to engage in any conduct or bestows any rights on them.

Thus the Counties' case, even if successful, would leave in place the basic decriminalization provision of the CUA and its prohibition against punishment of physicians, as well as numerous MMP provisions fleshing out how these provisions are applied. The Court should not grant review to consider only the tangential question whether the identification-card provisions are preempted by federal law.

Recognizing that resolution of their claims regarding the identification-card provisions alone would leave all of the CUA and much of the MMP unaffected, the Counties claim that they have standing to challenge other provisions of both laws. San Diego argues that the Court of Appeal erred in restricting its analysis to the identification-card requirement because "[i]t is apparent that the key issue presented in this case is whether the provisions of the Medical Marijuana Law, which authorize individuals to engage in conduct that violates the CSA, are preempted." Pet. of San Diego County 34. That may be the "key issue" of concern to San Diego County, but it is not the "key issue" that this case presents—first, because the Counties never challenged California's decriminalization provision; and second, because the Counties would not have standing even if they had challenged it. If, as San Diego argues, the decriminalization issue is what ought to be addressed, it would be fruitless for this

Court to grant review in this case, which presents the identification-card issue alone.

The Counties also claim they should be granted standing as a matter of necessity, because others who might disagree with California's medical marijuana laws do not themselves have standing. As San Diego puts it, California citizens "claiming that the Medical Marijuana Law is preempted would not be able to show they personally are harmed by other people's use of marijuana for medical purposes." Pet. of San Diego County 37. Whether or not that is true, it is irrelevant to the standing inquiry. No one, the Counties included, has a legally protected interest in the abstract and widely-shared desire to ensure that only valid laws are in force. As this Court has said, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (standing doctrine prevents federal courts from "decid[ing] abstract questions of wide public significance" because "other governmental institutions may be more competent to address the questions" (citation and internal quotation marks omitted)).

Relatedly, San Bernardino County points out that California courts appear to allow standing "if for no other reason than the public importance of the issue presented," Pet. of San Bernardino County 16

(citing *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (Cal. Ct. App. 2007), *cert. denied*, 129 S. Ct. 623 (2008)), and pleads with *this* Court to resolve a purported split in *California* authority on that question. The answer to that argument is simple: California courts need not adhere to the strict Article III limits on federal-court adjudication that this Court is obliged to follow. Indeed, in *Garden Grove*, the decision on which San Bernardino relies for its view that standing should be granted whenever the issue presented is one of "public importance," the California Court of Appeal acknowledged that the City did *not* have standing under "the federal injury in fact test," 157 Cal. App. 4th at 366-70, but nonetheless held that "public policy considerations dictate that we afford the City standing," *id.* at 365, based on loose state-law principles favoring standing where a "party may otherwise find it difficult or impossible to challenge the decision at issue." *Id.* at 371 (citing California law).[3] Here, by contrast, Article III applies, and this Court has long recognized that "[t]he assumption that if [particular plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing" under Article III. *Schlesinger v. Reservists*

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[3] In *Garden Grove*, after losing on the merits, the City sought review in this Court, and the respondent opposed certiorari on the ground, among others, that even though California courts were willing to hear the case, the City lacked Article III standing to obtain review in this Court. Respondent Kha's Br. in Opp. 4-7, *City of Garden Grove v. Superior Court*, No. 07-1569 (S. Ct. filed Oct. 23, 2008). This Court denied review. 129 S. Ct. 623 (2008).

Comm. To Stop the War, 418 U.S. 208, 227 (1974); *accord Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982).

2. At most, the question for decision in this case is whether federal law preempts California's identification-card provisions. But this Court's prudential standing doctrine counsels against reviewing even that narrow question. In order to determine whether the Counties have suffered an injury in fact by virtue of the identification card requirements, this Court must look to a difficult issue of unresolved state law. "When hard questions of [state law] are sure to affect the outcome [of the standing analysis], the prudent course is for the federal court to stay its hand." *Newdow*, 542 U.S. at 17. It is not at all clear, in the absence of guidance from the California Supreme Court, whether the Counties have suffered a legally cognizable injury.

The MMP specifically authorizes counties to charge identification-card applicants a fee sufficient to allow recovery of "all costs incurred by the county" for administering the card program, Cal. Health & Saf. Code § 11362.755(a), thus enabling counties to insulate themselves from any injuries that otherwise might be imposed by the program and rendering the Counties' role under the MMP wholly ministerial. When presented with the question, the California Supreme Court may well hold that, in light of this "hold harmless" provision, California's counties are not injured by the MMP's identification-card requirement. Such a state-law holding would negate a county's Article III standing to challenge even the

identification-card aspect of California's medical marijuana law because the county would then lack a legally protected interest under California law. Because of this possibility, this Court's prudential standing doctrines counsels in favor of awaiting an authoritative state-law determination from the California Supreme Court on the question whether the identification-card provisions invade any legally protected interest of the Counties under state law, instead of wading into the murky question of state law as a prerequisite to considering the validity of the identification-card provisions under the Supremacy Clause.

For a variety of reasons, then, this case is not an appropriate vehicle for considering whether California's medical marijuana laws are preempted, and review should be denied.

II. Resolution by This Court Is Unnecessary, Because There Is No Split of Authority on the Issues Fresented.

The Counties do not suggest, nor are Respondents aware of, any split of authority regarding the issue decided below: whether a medical marijuana identification-card program is preempted by the CSA. Thirteen states have decriminalized medical marijuana since 1996. Eleven of these states issue identification cards or similar documentation to assist law enforcement in distinguishing between legitimate patients and those whose marijuana use

remains illegal under state law.[4] To Respondents' knowledge, in the intervening years, only the Petitioners in this case have argued that any aspect of any state's medical marijuana regime is preempted by federal law. In this case, all four judges to consider this contention rejected it, and the case did not warrant the attention of the California Supreme Court. There are no other cases addressing this issue. Thus there is no lower-court conflict in need of this Court's resolution, and given the lack of other litigation, no prospect of such a conflict.

Petitioner San Bernardino County attempts to raise the specter of a circuit split by pointing out that various lower courts disagree on the question whether a political subdivision has standing to raise federal constitutional claims against its parent state in federal court, *see* Pet. of San Bernardino County 18-19—but this question is not implicated by the decision below, which, as explained in the previous section, held that the Counties lacked standing to bring most of their claims because they lacked a concrete injury. *See* Pet. App. 20 (Petitioners "do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them"). The standing question here is merely whether, assuming that political subdivisions *do* have a right to sue on Supremacy

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[4] *See* Alaska Stat. § 17.37.010; Cal. Health & Saf. Code § 11362.71; Colo. Const. art. 18, sec. 14(2)(b); Haw. Rev. Stat. § 329-123(b); Mich. Comp. Laws § 333.26424(a); Mont. Code Ann. § 50-46-201(1); Nev. Rev. Stat. § 453A.200(1); N.M. Stat. Ann. § 26-2B-4(D); Or. Rev. Stat. § 475.306(1); R.I. Gen. Laws § 21-28.6-4(a); Vt. Stat. Ann. tit. 18, § 4473(b).

Clause grounds to invalidate state laws adopted by their parent states, the Counties here have suffered an injury-in-fact sufficient to allow them to access to federal court, which is a bedrock requirement of any federal adjudication. There is no circuit split on that question nor is there any serious dispute that the Counties have failed to demonstrate any injury-in-fact from California's medical marijuana laws (with the possible exception of the identification-card provision).

III. The Court Below Correctly Applied Settled Law in Rejecting the Counties' Preemption Claim.

Review is also unwarranted because the decision below applied settled legal principles to reach a correct result. The California Court of Appeal held that California's identification-card program is not preempted by the CSA because the CSA expressly disclaims any congressional intent to occupy the field, there is no positive conflict between federal and California law, and the issuance of identification cards to individuals who cannot be punished under state law for their medical marijuana use in no way interferes with the ability of federal officers to enforce federal law.

1. In its preemption analysis, this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Because congressional purpose is the "touchstone" of preemption analysis, *Cipollone*, 505 U.S. at 516, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Here, the Court's task is easy indeed. In enacting the CSA, Congress explicitly stated its intent to preempt only those state laws that are in "positive conflict" with the federal law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

In section 903, Congress made two points clear. First, Congress expressly disclaimed "an intent . . . to occupy the field" of drug regulation, "including criminal penalties." *Id.* Thus there is no field preemption here, as the Court of Appeal correctly held, *see* Pet. App. 23, and the Counties do not argue otherwise.

Second, Congress made clear that it wished to limit the scope of preemption under the CSA to

circumstances in which "there is a *positive conflict* between [a CSA provision] and [a] State law *so that the two cannot consistently stand together.*" 21 U.S.C. § 903 (emphasis added). This Court has long understood this type of positive conflict to arise where "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). The California medical marijuana laws under attack here do not create such an impossibility. Nothing in the CUA or MMP requires the Counties (or anyone else) to do something that federal law forbids. All that the Counties must do is issue identification cards to help state officers ascertain the status of certain individuals under state law. Clearly, it is possible for the Counties to comply with all applicable provisions of the federal CSA, and at the same time to comply with state law by issuing identification cards to medical marijuana patients so that state officers will know their marijuana use is not criminal under state law. This Court has recently reiterated that "[i]mpossibility pre-emption is a demanding [standard]." *Wyeth v. Levine*, 129 S. Ct. 1187, 1999 (2009). That standard is not satisfied here.

As the Court of Appeal correctly held, the absence of a positive conflict is dispositive in this case. *See* Pet. App. 30-34. Although an express statutory provision defining the scope of intended preemption does not entirely foreclose "any possibility of implied preemption," *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995), an express anti-preemption

clause is nonetheless an important signal regarding congressional intent, and this Court has treated it as such. At a minimum, such clauses can provide "a reliable indicium of congressional intent." *Id.* The anti-preemption clause of the CSA provides much more than that. In unambiguous language, it preserves every state law concerning controlled substances "unless there is a *positive conflict* between [the CSA] and that State law *so that the two cannot consistently stand together.*" 21 U.S.C. § 903 (emphasis added). As the Court of Appeal properly recognized, this language is susceptible to just one reasonable interpretation: Congress intended to preempt only state laws in positive conflict with the CSA, and no others. *See* Pet. App. 30-34 (opinion below, reaching this conclusion); *see also S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 590-91 (4th Cir. 2002) (interpreting 18 U.S.C. § 848, whose language is materially identical to 21 U.S.C. § 903, to permit preemption only in "cases of an actual conflict . . . such that compliance with both federal and state regulations is a physical impossibility" (citation and internal quotations marks omitted)). When Congress has expressed its intent on preemption so specifically and unmistakably, "there is no need to infer congressional intent to pre-empt state laws" from elsewhere in the statute. *Freightliner*, 514 U.S. at 288 (citations and internal quotation marks omitted).

2. Lacking any support in the text of the CSA, Petitioners ask this Court to find that Congress, after making its intent clear through the CSA's explicit "positive conflict" language, nonetheless implicitly intended a broader scope of preemption under the

theory that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (finding that federal immigration law implicitly preempted a state immigration law because of the federal government's sovereign power in the field of international relations). The Court of Appeal was correct to reject obstacle preemption here. As this Court has recognized, the CSA "explicitly contemplates a role for the States in regulating controlled substances." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). In the absence of a congressional judgment that a single uniform standard of criminal conduct is necessary to the accomplishment of federal objectives, no conflict can exist between the federal government's decision to make certain conduct criminal under federal law and several states' (including California's) decision not to also make that conduct criminal under state law—which the Counties do not challenge—and in turn to adopt measures assisting local law enforcement by facilitating the identification of persons not subject to arrest or prosecution under state law.

Even assuming that implied obstacle preemption can exist under the CSA, a state identification card that does not purport to exempt anyone from the requirements of federal law poses no obstacle to its enforcement. Although California has directed its own officers to pay heed to the identification card in enforcing state law, federal officers are free to ignore it when enforcing federal law. The card does not prevent federal officers from investigating federal drug crimes, nor from arresting

individuals suspected of federal drug crimes, nor from prosecuting individuals for federal drug crimes, nor from applying the CSA's property-forfeiture provisions, *see* 21 U.S.C. § 881. Nor does the card purport to do any of these things. *See* Pet. App. 35 (decision below) (observing that "the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses"). Possession of a state-issued piece of paper, even one that has official state purposes, does not stand in the way of the federal government's enforcement of federal criminal law, any more than a California prosecutor's decision not to prosecute a suspect under any state law would bar a federal prosecution, under federal law, of the same person for the same conduct.

The mere fact that state and federal criminal law do not march in lockstep does not create a conflict; on the contrary, under the principles of state sovereignty this Court articulated in *Printz v. United States*, 521 U.S. 898 (1997), "state legislatures are *not* subject to federal direction," *id.* at 912 (emphasis in original). More specifically, "'[e]ven where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.'" *Id.* at 924 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). If the Counties were correct that a state's decision not to criminalize the same conduct as federal law stands as an obstacle to that law and is therefore preempted, the result would be precisely what *Printz* forbids: Federal law would force

States to enact criminal prohibitions that mirror those of federal law. This Court, mindful of the careful balance of dual sovereignties established by the Constitution, has never countenanced such a far-reaching preemption doctrine, and the Court of Appeal was right to reject it.

The Counties nonetheless characterize California's decriminalization of medical marijuana and its system for implementing that decision as "thwart[ing] federal law," Pet. of San Bernardino County 6, and as providing a "get-out-of-jail-free" card for violations of federal law, *id.* at 10. These characterizations suffer from the same fatal flaw: They assume that state criminal law must march in lockstep with federal criminal law or else be preempted. But a State's decision to exercise its constitutional right not to enact or administer a federal regulatory program, *see Printz*, 521 U.S. at 933, does not unconstitutionally "thwart federal law," and the Counties fail to mention that what they dub California's "get-out-of-jail-free" cards save the bearer only from California, and not federal, jails. Respondents are unaware of any case, and the Counties have cited none, where federal criminal law was held to preempt a state's penal code because the state law did not criminalize the exact same conduct that federal law did, or because state law provided an efficient means for state and local officers to determine whom to arrest for violations of state law. Thus the Court of Appeal's rejection of the Counties' implied preemption arguments is correct and consistent with this Court's preemption jurisprudence.

Were it otherwise, the scope of federal preemption in the field of criminal law would be staggering: All state criminal law regimes—including criminal drug law regimes—that criminalized a smaller set of conduct than federal criminal law would be preempted under the theory the Counties advance. There are thousands of such state laws, which the States have a sovereign right to enact.[5] Under the Counties' novel and sweeping view of obstacle preemption, every one of these laws would be preempted because they would pose an obstacle to achieving the goals of the more restrictive federal law. This cannot be correct, as it would give preemptive effective to each one of the "countless . . . federal criminal provisions [that prohibit] conduct

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[5] For example, some states permit the sale of a handgun to an individual 18 to 21 years old, even though federal law forbids such conduct. *Compare, e.g.*, Idaho Code Ann. § 18-3302A (state restriction on gun sales applies only to purchasers under 18 years old); Tex. Penal Code Ann. § 46.06(a)(2) (same), *with* 18 U.S.C. § 922(b)(1) (federal restriction on gun sales applies to purchasers under 21, unless the gun is a shotgun or rifle). Some states do not criminalize the solicitation of 16- and 17-year-olds for sexual activity, even though federal law prohibits it. *Compare, e.g.*, Conn. Gen. Stat. § 53a-90a(a) (state law criminalizing sexual solicitation of individual less than 16 years old); Wis. Stat. § 948.075 (same), *with* 18 U.S.C. § 2422(b) (federal law criminalizing sexual solicitation of individual less than 18 years old). And in addition to medical marijuana laws, some state laws decriminalize the possession of controlled substances under other narrowly defined circumstances. *See, e.g.*, N.M. Stat. Ann. § 30-31-27.1 (exempting from state criminal prosecution the possession of a controlled substance by an individual who needs medical assistance due to a drug overdose or who seeks medical assistance for a person experiencing an overdose).

that happens not to be forbidden under state law." *Gonzales*, 546 U.S. at 290 (Scalia, J., dissenting).

Finally, the decision below is consistent with this Court's recent preemption cases addressing the relationship between federal regulatory regimes and state tort law, *see Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). Because these cases deal with the careful policy balances embodied by complex federal regulatory structures and state tort law standards of negligence, rather than the straightforward decisions about what conduct each sovereign chooses to criminalize, it is questionable whether the tort cases apply here at all. To the extent they do, this Court's analysis in *Wyeth* demonstrates that there is no positive conflict if, as here, the Counties can satisfy their state-law obligations without violating federal law. *See Wyeth*, 129 S. Ct. at 1196-99 (no preemption where drug company could satisfy more demanding state tort law standard for prescription drug warning label without violating federal labeling requirements). As for obstacle preemption, *Wyeth* also reaffirmed that, "'[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Id.* at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)). This Court in *Wyeth* found significant the "longstanding coexistence of state and federal law" in the field of

prescription drug labeling, *id.* at 1203; similarly, here, as discussed, Congress has eschewed a one-size-fits-all approach in favor of a federalist scheme that leaves states free to enact their own penal laws for controlled substances—an area of traditional state concern. *See* 21 U.S.C. § 903; *Gonzales*, 546 U.S. at 251 (noting that the CSA "explicitly contemplates a role for the States in regulating controlled substances"). That California has taken Congress up on its invitation is consistent with congressional intent, and the Court of Appeal was correct in so holding.

In sum, the Counties cannot be correct that any state penal drug regime that does not criminalize the entire range of conduct prohibited by the CSA must be preempted. The Counties' position ignores the clearly expressed intent of Congress and contravenes a basic tenet of State sovereignty. If accepted, the Counties' argument would result in the preemption of countless state statutes and effectively federalize state criminal law, at least whenever the congressional judgment about what conduct should be subject to criminal penalties is stricter than that of a state. Accordingly, the California Court of Appeal was correct to find no preemption here. The CSA plainly permits the States to enact penal drug laws that do not criminalize the same exact conduct as federal law, and as a corollary, to adopt measures designed to assist local law enforcement by identifying persons not subject to arrest or prosecution under state law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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